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INTERNATIONAL CIVIL LITIGATION IN CHINA: A PRACTICAL ANALYSIS OF THE CHINESE JUDICIAL SYSTEM

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Abstract: In recent years, international civil litigation in China has been on the rise. This trend will inevitably continue with China's entry into the World Trade Organization. Given the increase of foreign businesses in China, a better understanding of the Chinese judicial system becomes essential to protect foreign business interests. Jurisdiction, choice of law, and enforcement of judgments are three primary concerns of foreign parties seeking judicial relief and remedies in China. Questions commonly asked include: what are the bases for a Chinese People's Court to assert jurisdiction over foreign parties; what are the standards to determine judicial competence; how does a Chinese People's Court decide which law will be applied in each particular case involving "foreign elements;" and whether a judgment could be effectively enforced and by what means. Fear that China lacks the rule of law and an independent judicial system gives rise to hesitancy to conduct business in China and pursue legal rights. Creating public confidence in the judiciary is one of China's most important tasks, as it seeks to attract international business.

INTRODUCTION

Foreign companies doing business in China are commonly concerned about the ability of the Chinese judicial system to protect their legitimate business interests. To many foreigners, the Chinese People's Courts are mysterious, particularly when dealing with international civil litigation, despite the fact that China has been opening up to the outside world for more than twenty years.¹

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¹ China's "open-door" policy, proposed by the late leader Deng Xiaoping, was adopted in 1978. See Jerome Cohen, *China's Troubled Path to WTO*, INT'L FIN. L. REV. (Sept. 2001), available at <http://www.iflr.com>.

International civil litigation is known in China as the "civil case involving foreign elements."² In general, a civil case involving foreign elements refers to a civil action in which: (1) at least one of the parties is a foreigner, stateless person, foreign enterprise, or organization;³ (2) the legal facts creating, changing, or terminating the civil legal relations between parties occur in a foreign country;⁴ or (3) the subject matter of the dispute is located in a foreign country.⁵

There is no single law or regulation that specifically governs international civil litigation in China. The major piece of legislation governing international civil litigation is Part Four of the Civil Procedure Law of the People's Republic of China (CPL).⁶ Promulgated on April 4, 1991, Part Four of the CPL is entitled "Special Provisions of Civil Procedures for Cases Involving Foreign Elements."⁷ In addition, on July 14, 1992, the Supreme People's Court issued the "Opinions on Application of the Civil Procedure Law of the People's Republic of China" (Opinions on CPL).⁸ The Opinions on CPL provide important judicial guidance for all lower courts to follow.⁹

Structurally, the Chinese People's Courts operate at four different tiers: trial courts (basic level); intermediate courts; higher courts; and the Supreme People's Court, representing county, prefecture, province, and national levels, respectively.¹⁰ Special courts, such as maritime courts, railway courts, and military courts, also exist. Cur-

² See generally ZHONG HUA REN MIN GONG HE GUO MIN SHI SU SONG FA [LAW OF CIVIL PROCEDURES OF THE PEOPLE'S REPUBLIC OF CHINA] art. 237 (1991), available at <http://www.qis.net/chinalaw/lawtran1.htm> [hereinafter CPL]. A Chinese language version is available at <http://www.law.washington.edu/clnet/feature.html>; see also LIU ZIANG-SHU, RESEARCH ON THE ESSENTIAL ISSUES OF PRIVATE INTERNATIONAL LAW 368-69 (2001).

³ CPL, *supra* note 2, art. 241.

⁴ *Id.* art. 243. A typical example is a contract concluded in a foreign country or a tortious act committed in a foreign country.

⁵ See HAN DEPEI, PRIVATE INTERNATIONAL LAW 3-5 (2000); DONG LIKUN, INTERNATIONAL PRIVATE LAW 1-3 (2d ed. 2000); HUANG JIN, PRIVATE INTERNATIONAL LAW 2-5 (1999); LU JUN, THEORIES AND PRACTICES OF PRIVATE INTERNATIONAL LAW 3-5 (1998); LI SHUANGYUAN, GENERAL INTRODUCTION TO PRIVATE INTERNATIONAL LAW 1-7 (1996); ZHANG ZHONGBO & ZHAO XIANGLIN, PRIVATE INTERNATIONAL LAW 1-5 (1995).

⁶ See generally CPL, *supra* note 2.

⁷ *Id.* arts. 237-261.

⁸ Supreme People's Court, *Opinions on Application of the Civil Procedure Law of the People's Republic of China*, 31 ZUIGAO RENMIN FAYUAN GONGBAO 70 [31 GAZETTE OF THE SUPREME PEOPLE'S COURT 70] (1992) [hereinafter *Opinions on CPL*] (Chinese text).

⁹ See *id.* The Chinese legal system takes the tradition of continental law where the courts abide by law or statute but not precedent. Thus, higher court decisions or opinions have no binding effect on lower courts. In other words, the higher court's opinions may not be cited as legal grounds on which the lower court's decisions are made.

¹⁰ See CPL, *supra* note 2, arts. 18-21; JIANG WEI, CIVIL PROCEDURE LAW 86-89 (2000).

rently, the total number of people's courts in China is 3568, including 32 higher courts, 403 intermediate courts, and 3132 trial courts. Among these courts, 10 are maritime courts, 60 are railway courts, and 88 are military courts.¹¹

Under the CPL, judicial proceedings occur in two instances, namely, trial and appeal.¹² A decision made by an appellate court is final, and no appeal therefrom is allowed.¹³ If, however, the appellate decision was in error, a retrial may be requested through the trial supervision proceeding.¹⁴ Typically, these proceedings begin in the trial courts, which exercise general trial competence.¹⁵ But, under the CPL, a higher court, including an intermediate court, higher court, or the Supreme People's Court, may hear a case in the first instance if the case has a potential significant impact in the areas of their respective jurisdiction.¹⁶ International civil litigation in particular normally begins at the intermediate level, though it may commence at the trial level.¹⁷ This is because most, if not all, cases involving foreign elements are regarded as major cases having significant impact.¹⁸ Therefore, the trial of such cases in the first instance rests with the competent intermediate court.¹⁹ In the Opinions on CPL, the Supreme People's Court defines a major case involving foreign elements as a case in which the dispute involves a large amount in controversy, complicated facts, or in which a large number of parties reside abroad.²⁰

Within the people's courts at the intermediate or higher level, there are special divisions, such as the foreign division or economic division, that deal with international civil litigation.²¹ When hearing a

¹¹ *Id.* These numbers are based on the recent statistics available from a resource of the Supreme People's Court.

¹² See CPL, *supra* note 2, art. 10.

¹³ *Id.* See generally ZHONG HUA REN MIN GONG HE GUO REN MIN FA YUAN ZHU ZHI FA [ORGANIC LAW OF THE PEOPLE'S COURTS] 1 (1979) [hereinafter ORGANIC LAW].

¹⁴ *Id.* ch. 16. According to the CPL, a retrial may take place at the original court or the next higher court. The retrial request can be made by the president of the original court, the higher court having jurisdiction over the trial court, the Supreme People's Court, or the parties to the litigation. A retrial could also be launched upon protest by the people's procuratorate. Under the CPL, the retrial request made by a party must be submitted within two years after the judgment or order takes effect. See *id.*

¹⁵ CPL, *supra* note 2, art. 18.

¹⁶ See *id.* arts. 19, 20, 21.

¹⁷ *Id.* arts. 18–21.

¹⁸ *Id.*; WEI, *supra* note 10, at 88–89.

¹⁹ WEI, *supra* note 10, at 89.

²⁰ See *Opinions on CPL*, *supra* note 8, at 93.

²¹ ORGANIC LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 24 (1983).

case in accordance with the CPL, the people's court shall form either a collegial panel consisting of an odd number of both judges and judicial assessors (jurors) or judges alone, except for hearings under summary procedures in which a single judge presides.²² During a trial involving foreign elements, the foreign party may represent itself, be represented by a foreign agent *ad litem*, or a foreign lawyer present at the trial as a non-lawyer.²³ The CPL requires that if a foreigner, stateless person, foreign enterprise, or organization needs a lawyer when litigating in a people's court, the lawyer must be Chinese.²⁴

During the past several years, the Chinese People's Courts have taken greater number of cases involving foreign elements, and this trend seemingly will continue. For example, from 1994 to 1998, the total number of cases involving foreign elements tried by the people's courts in the first instance was 17,368, with an average 3473 per year.²⁵ During 1998–2000, the average number of such cases increased to over 4500 per year (13,527 in total for the three years).²⁶ This increase is attributed to at least two aspects. First, China's fast-growing economy has dramatically enhanced China's presence in the world market and thus significantly generated more transnational business transactions and foreign investment.²⁷ As a result, the number of civil disputes inevitably increased.²⁸ Second, the Chinese People's Courts positioned themselves to deal with litigation involving foreign parties. One particular issue arising is whether to treat both Chinese and foreign parties equally in litigation.²⁹ The public image desired by the people's courts is one of competence in handling cases involving foreign elements fairly and justly. To that end, the Supreme People's

²² See CPL, *supra* note 2, art. 40.

²³ See *id.* arts. 58, 241.

²⁴ *Id.* art. 241. At present, however, no foreigners are allowed to take the Chinese bar exam.

²⁵ See SUPREME PEOPLE'S COURT, ZU GAO REM MIN FAY YUE GONG ZUO BAO GAO [WORKING REPORT OF THE SUPREME PEOPLE'S COURTS TO THE NATIONAL PEOPLE'S CONGRESS] 1 (1998).

²⁶ See *id.* The recent statistics are from a resource of the Supreme People's Court.

²⁷ During the five-year period of 1996–2000, China's economy grew at an average annual rate of 8.3%, and foreign investment reached U.S. \$289.4 billion. See Zhu Rongji, *Government Report on China's Next Five-Year Plan to the National People's Congress of China on March 5, 2001*, CHINA DAILY, Mar. 6, 2001, at 1. In the first half of 2001, China's total volume of imports and exports accounted for US \$235.59 billion, and its foreign exchange reserves totaled U.S. \$180.838 billion. See PEOPLE'S DAILY OVERSEAS EDITION, Oct. 31, 2001, at 1.

²⁸ RALPH H. FOLSOM, LAW AND POLITICS IN THE PEOPLE'S REPUBLIC OF CHINA 235–38 (1992).

²⁹ See generally CPL, *supra* note 2, art. 8.

Court repeatedly asked all courts to exercise jurisdiction over cases involving foreign elements in strict accordance with existing law, treaty, and private agreement.³⁰

Despite the efforts of the Supreme People's Court to improve the Chinese judicial system and the success of foreign parties in the people's courts,³¹ many foreigners and foreign companies are still skeptical about litigating in Chinese courts. This reluctance is rooted in the fear that China is short of the rule of law in general and is lacking an independent judicial system. Nevertheless, foreigners and foreign companies doing businesses in China are subject to the jurisdiction of the Chinese courts.³² Therefore, a better understanding of the Chinese judicial system and Chinese court proceedings in international civil litigation is essential to effectively protect foreign business interests.

This Article is intended to address the Chinese judicial system pertaining to international civil litigation, focusing on practical matters that may affect foreign parties who sue or are sued in the Chinese People's Courts. Part I of this Article discusses the jurisdiction of the Chinese People's Courts in international civil litigation and the extent to which the courts strive to exercise jurisdiction. Part II analyzes the choice of law issues presented by cases involving foreign elements in the Chinese People's Courts. Part III deals with the enforcement of judgments by the Chinese People's Courts. Part IV identifies flaws in the Chinese judicial system that may affect judicial independence and justice. Part V concludes that international civil litigation in the Chinese People's Court requires further improvement of judicial independence in order to protect legitimate foreign interests and promote confidence in the Chinese judicial system.

³⁰ See Li Guoguang, Vice-President of the Supreme People's Court, Several Policy Issues Concerning the Current Trials in Civil Cases, Speech at the National Conference of Civil Trials (Oct. 28, 2000), in 68 ZUIGAO RENMIN FAYUAN GONGBAO 5 [68 GAZETTE] (2000).

³¹ Cohen, *supra* note 1, at 4–5. For example, in 2000, Procter & Gamble won a case against Beijing Tiandi Electronic Group over the domain name “tide.com.cn” in Beijing No. 1 Intermediate People's Court. See Procter & Gamble v. Beijing Tiandi Electric Group, Beijing Yizhong Zhichuzhi 49 (2000). In the same year, Ikea Inc. won a lawsuit against a Chinese company over the domain name “ikea.com.cn” in Beijing No. 2 Intermediate People's Court. See Inter Iker Inc. v. Guowang Inc., Beijing Erzong Zhichizhi 86 (1999).

³² See, e.g., CPL, *supra* note 2, art. 4.

I. JURISDICTION OF THE CHINESE PEOPLE'S COURTS IN INTERNATIONAL CIVIL LITIGATION

The people's courts' civil jurisdiction stems from both the Chinese Constitution (as amended 1999) and the CPL.³³ These documents empower the courts to adjudicate cases arising from disputes concerning property and personal relations between or among citizens, legal persons, or other organizations.³⁴ With regard to civil litigation involving foreign elements, the jurisdiction of the people's courts is governed by both general and special provisions of the CPL.³⁵ In addition, the Supreme People's Court plays an important role in determining the lower courts' jurisdiction pertaining to a particular type of case.³⁶ For example, the Supreme People's Court requires that first instance cases involving patent disputes be adjudicated by an intermediate people's court designated by the Supreme People's Court.³⁷

Under the provisions of the CPL, the jurisdiction of the Chinese People's Courts is divided generally into four categories—tier jurisdiction, transferred jurisdiction, designated jurisdiction, and territorial jurisdiction.³⁸ In addition to proper subject matter jurisdiction, the people's court must also meet both the tier and territorial requirements.³⁹

Tier jurisdiction refers to the jurisdiction of the people's courts at each level, and dictates the level at which a particular case shall be filed in the first instance.⁴⁰ Since in any given case there is only one appeal available under the "two-instance trials format," it is important that the case start at the correct level.⁴¹ For a case involving foreign elements, commencing it at a higher level court is desirable given that most lower courts are inexperienced in handling international civil litigation.⁴²

³³ XIANFA art. 132 (1999) [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1999)]; CPL, *supra* note 2, arts. 2, 18–21.

³⁴ CPL, *supra* note 2, art. 3.

³⁵ *Id.* arts. 3, 237.

³⁶ *Id.* art. 21.

³⁷ See *Opinions on CPL*, *supra* note 8, at 71.

³⁸ CPL, *supra* note 2, art. 18–39.

³⁹ *Id.* arts. 22, 23, 35.

⁴⁰ *Id.* arts. 18–21; WEI, *supra* note 10, at 86–89.

⁴¹ See CPL, *supra* note 2, art. 147.

⁴² If a case starts in an intermediate level court, a higher court will hear the appeal. If a higher court takes the case for the trial of first instance, the Supreme People's Court will have to take the case if an appeal follows. See *id.* art. 18.

On April 9, 1999, the Supreme People's Court issued a "Notice on Taking of Cases Concerning Civil and Commercial Disputes at Higher Court of Provinces for the Trial of First Instance."⁴³ According to this Notice, a first instance case involving foreign elements may commence at a higher court if the amount in controversy meets minimum requirements.⁴⁴ This jurisdictional amount requirement varies depending on the location and the cause of action, as well as whether a property-related or business dispute is at stake.⁴⁵ In Beijing, Shanghai, and Guangzhou, for example, the amount in controversy requirement in a business dispute case is RMB 80 million (about U.S. \$9.76 million).⁴⁶ In provinces such as Gansu, Guizhou, Xing Jiang, Inner Mongolia, Qinghai, Ningxia, Yun Nan, and Tibet, the amount is reduced to RMB 8 million (about U.S. \$976,000) for a similar case.⁴⁷ In property-related cases, the Supreme People's Court set a ceiling for the number of cases per year that the higher courts may take in the first instance in addition to the amount in controversy requirement.⁴⁸ An approval must be obtained from the Supreme People's Court if a higher court wants to take a first instance case on the ground of "significant impacts" when the case lacks the required jurisdictional amount, or the total number of cases taken exceeds the ceiling.⁴⁹

Transferred jurisdiction is analogous to a venue transfer and deals with the transfer of a case from a non-competent court to a competent court.⁵⁰ Under Article 36 of the CPL, if a people's court finds that it has taken a case without proper jurisdiction, it shall transfer the case to the people's court that has jurisdiction.⁵¹ If the court to which the case is transferred believes that it also lacks jurisdiction, it shall refer the case to a higher court for designation of jurisdiction.⁵²

⁴³ Supreme People's Court, *Notice on Taking of Cases Concerning Civil and Commercial Disputes at Higher Court of Provinces for the Trial of First Instance*, 59 ZUIGAO RENMIN FAYUAN GONGBAO 90 (1999) [hereinafter 59 GAZETTE] (Chinese text).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* In Shandong, Jiangsu, Liaoning, and Zhejiang provinces, the minimum amount in controversy is RMB 30 million (U.S. \$3.66 million), and in the other fifteen provinces, the amount is RMB 20 million (U.S. \$2.42 million). See 59 GAZETTE, *supra* note 43, at 90.

⁴⁸ *Id.* In Beijing, Shanghai, and Guangdong, the total number of such cases shall not exceed ten in any given year. The total number is limited to eight per year in Fujian, Zhejiang, Hainan, and Hubei, and five in any other provinces. *Id.*

⁴⁹ See *id.*

⁵⁰ See CPL, *supra* note 2, art. 36; WEI, *supra* note 10, at 98–99.

⁵¹ See CPL, *supra* note 2, art. 36.

⁵² *Id.*

In accordance with the CPL, for transferred jurisdiction to be valid three conditions must be met: (1) the case must have been taken; (2) the transferring court must lack jurisdiction; and (3) the case must be transferred to a competent court.⁵³ The jurisdiction of the transferring court shall be determined from the record as of the time the transferring court accepts the case.⁵⁴

Designated jurisdiction occurs when a higher court orders a lower court to exercise jurisdiction that it would otherwise lack.⁵⁵ Pursuant to the CPL, jurisdiction may be designated to a lower court if: (1) the case is transferred to a court that lacks jurisdiction; (2) the court that is competent could not exercise its jurisdiction due to some special reasons, such as natural disaster or on the legal grounds of recusal; or (3) more than two competent courts are in dispute over their jurisdiction on the case and the dispute cannot be solved by an agreement between the disputing courts.⁵⁶

Perhaps the most important feature of the people's courts' jurisdiction is territorial jurisdiction.⁵⁷ Questions of territorial jurisdiction in the people's courts are typically determined by reference to the relations between the forum and the parties, disputes, or *factum jurisdictionis* (legal facts).⁵⁸ To be precise, territorial jurisdiction determines venue, personal jurisdiction, and jurisdiction over property.⁵⁹ As noted, with regard to cases involving foreign elements, the CPL contains both general and special rules determining the people's courts' jurisdictional competence.⁶⁰ The factors determining territorial jurisdiction are domicile, place of business, conduct, location of property, and party consent.⁶¹ Based on the difference of these factors, territorial jurisdiction can be further divided into general territorial jurisdiction, specific jurisdiction, consensual jurisdiction, and exclusive jurisdiction. Note that China does not follow the practice of some civil law countries, such as France, in which nationality serves as an important basis for a court to assert its jurisdiction.

⁵³ See *id.*

⁵⁴ *Id.* This is also called the "Principle of Jurisdiction Constant," which means that the jurisdiction shall not be affected by a later change of jurisdictional basis.

⁵⁵ *Id.* art. 36; WEI, *supra* note 10, at 89–95.

⁵⁶ CPL, *supra* note 2, art. 36.

⁵⁷ See *id.* art. 22.

⁵⁸ *Id.* arts. 26–34; WEI, *supra* note 10, at 89–95.

⁵⁹ See generally CPL, *supra* note 2, arts. 26–34.

⁶⁰ *Id.* arts. 3, 237.

⁶¹ *Id.* arts. 22, 23, 25, 26, 30; DEPEI, *supra* note 5, at 431–34.

A. General Territorial Jurisdiction—Defendant Domicile

General territorial jurisdiction is determined by the defendant's domicile.⁶² The people's courts may exercise jurisdiction over a given defendant who is domiciled, resides, or conducts business within the territorial boundary of the court, regardless of the defendant's nationality.⁶³ According to the CPL, a civil lawsuit generally shall be brought in the people's court at the place of the defendant's domicile.⁶⁴ If a defendant has both a domicile and a habitual residence, jurisdiction is proper in the venue of the defendant's habitual residence.⁶⁵ When there are several defendants who are domiciled or reside in two or more jurisdictional territories, the courts in those territories shall all have jurisdiction.⁶⁶ In this circumstance, the CPL allows a plaintiff to choose one of the competent courts. If the plaintiff files a lawsuit with two or more competent courts, the court with which the lawsuit was first filed shall exercise jurisdiction.⁶⁷

The defendant's domicile-based jurisdiction rests with the jurisdiction doctrine commonly characterized as "plaintiff's accommodating defendant."⁶⁸ An exception to this doctrine applies, however, when the personal status of the parties is involved. Under the CPL, if a civil lawsuit concerning personal status is brought against a person not residing in China, the court of plaintiff's domicile or habitual residence shall have jurisdiction.⁶⁹ According to the Supreme People's Court, a Chinese plaintiff may sue his or her spouse in a people's court of his or her domicile for divorce if the spouse resides in a foreign country.⁷⁰

B. Specific Territorial Jurisdiction—Conduct and Property

In international civil litigation, many cases involve a foreign defendant not domiciled or residing within China. In such a case, the

⁶² See CPL, *supra* note 2, art. 22.

⁶³ See *id.*

⁶⁴ *Id.* art. 22.

⁶⁵ *Id.*; *General Principles of the Civil Law of the People's Republic of China*, available at <http://www.qis.net/chinalaw/prclaw27.htm> (last visited Sept. 27, 2001) [hereinafter CIVIL CODE 1986]. Domicile is defined as the place of registered household of a natural person or main business place of a legal person or economic organization.

⁶⁶ See CPL, *supra* note 2, art. 22.

⁶⁷ See *id.* art. 35.

⁶⁸ WEI, *supra* note 10, at 90.

⁶⁹ CPL, *supra* note 2, art. 23. For purposes of jurisdiction, personal status is created by special relations, such as marriage or blood, or by law, such as civil ability or capacity.

⁷⁰ See *Opinions on CPL*, *supra* note 8, at 71.

people's court has jurisdiction if the defendant has established certain connections with China.⁷¹ It is, however, important to note that "mere presence" in China does not constitute a basis on which a people's court may exercise jurisdiction.⁷² Therefore, for jurisdiction purposes, the connection must be meaningful, providing a "sufficient ground" warranting the exercise of the people's courts' judicial power.

Thus, the CPL specifically grants the people's courts jurisdiction over international civil actions founded upon claims arising out of a foreign defendant's conduct or property.⁷³ Under Article 243 of the CPL, certain specific jurisdiction rules shall apply to actions involving contract disputes or other disputes over property rights against a non-resident defendant.⁷⁴ According to these rules, if the contract is concluded or performed in China, a people's court at the place of contract or the place of performance shall have jurisdiction.⁷⁵ If the subject matter of the claim is located in China, the jurisdiction shall rest with the people's court where the subject matter of the claim is located.⁷⁶ If the defendant has attachable property in China or has a representative office in China, the defendant shall be subject to the jurisdiction of the people's court at the place of such property, or the place of the representative office.⁷⁷ In a tort action, the place of tort shall be the determinative factor for jurisdiction.⁷⁸

A contract or tort action requires further attention. In a contract dispute, parallel jurisdiction would exist between the court of *locus contractus* (the place of a contract) and the court of *locus solutionis* (the place of a contract performance), if these jurisdictions are different.⁷⁹ In this situation, the plaintiff may choose either one of these courts for litigation.⁸⁰ In a business contract, if the name of the contract does not match the substance of contractual obligations contained therein, the place of contract performance shall be determined with reference

⁷¹ See CPL, *supra* note 2, art. 243; JIN, *supra* note 5, at 898–902.

⁷² See CPL, *supra* note 2, arts. 343–46.

⁷³ *Id.* art. 243.

⁷⁴ *Id.*

⁷⁵ *Id.* art. 24.

⁷⁶ *Id.* art. 26.

⁷⁷ Jurisdiction over a defendant's attachable property is also called "attachment jurisdiction." It occurs when a non-resident defendant has property that is physically present in the country and the property could be attached at the commencement of the proceedings.

⁷⁸ See *Opinions on CPL*, *supra* note 8, at 72.

⁷⁹ CPL, *supra* note 2, arts. 24, 25, 243.

⁸⁰ *Id.* art. 35.

to the substance.⁸¹ If it is difficult to tell the nature of a contract on the basis of its substance and if the name of the contract matches part of the substance, the name of the contract shall be used to determine the place of contract performance.⁸² As far as a tort action is concerned, jurisdiction shall be asserted by the people's court where the cause of action arose or the place of defendant's domicile.⁸³ The place of tort is interpreted by the Supreme People's Court to include both *locus delicti commissi* (place where a tort is committed) and the place where harms have occurred.⁸⁴ Once again, the plaintiff may choose among these venues.

On November 22, 2000, the Supreme People's Court issued an "Interpretation on Matters Concerning Application of Law in the Trial of Cases Involving Computer Network Copyright."⁸⁵ In this Interpretation, the Supreme People's Court expanded the place of tort to include the location of the computer equipment, such as the server or network terminal, where the tortious act is committed. The Supreme People's Court was also of the opinion that in a tort action concerning computer network copyright where both the place of the tort and the place of defendant's domicile could not be determined, the place of the network terminal equipment where the tortious contents were found may be deemed as the place of the tort.⁸⁶

For cases arising from other causes of action, jurisdiction is determined with reference to other provisions of the CPL.⁸⁷ For example, under Article 26 of the CPL, a case involving insurance contracts shall be adjudicated by the people's court at the place of defendant's domicile or the place where the insured object is located.⁸⁸ According to Article 27, jurisdiction over disputes concerning negotiable instruments is proper at the place where payment was due.⁸⁹

⁸¹ Supreme People's Court, *Reply to Questions Concerning Determination of the Court Jurisdiction when the Contract Name is Inconsistent with the Substance of the Contract*, 48 ZUIGAO RENMIN FAYUAN GONGBAO 131 (1996) [hereinafter 48 GAZETTE] (Chinese text).

⁸² *Id.*

⁸³ CPL, *supra* note 2, art. 29.

⁸⁴ *See Opinions on CPL*, *supra* note 8, at 72.

⁸⁵ Supreme People's Court, *Interpretation on Matters Concerning Application of Law in the Trial of Cases Involving Computer Network Copyright*, 69 ZUIGAO RENMIN FAYUAN GONGBAO 26 (2001) [hereinafter 69 GAZETTE] (Chinese text).

⁸⁶ *See id.*

⁸⁷ *See* CPL, *supra* note 2, arts. 24–33.

⁸⁸ *Id.* art. 26.

⁸⁹ *See id.* art. 27.

C. *Consensual Jurisdiction—Parties' Choice or Consent*

The CPL allows litigants to choose a court through mutual agreement.⁹⁰ Therefore, the people's courts' jurisdiction could also be established by consent of the parties.⁹¹ However, under Article 244 of the CPL, such choice is subject to three conditions: (1) the agreement must be made in writing; (2) the court chosen must have an actual connections with the dispute; and (3) the dispute must involve foreign contracts or foreign property rights.⁹² Article 244 further requires that the parties' choice of court be made without violating the provisions of the CPL concerning tier and exclusive jurisdiction if a Chinese People's Court is chosen.⁹³ A similar provision is found in Article 25 of the CPL, which applies to domestic civil cases.⁹⁴ It provides that parties to a contract may choose, in their written contract, to be subject to the jurisdiction of the people's court at the place of defendant's domicile or residence, contract performance, contract conclusion, or subject matter of the claim.⁹⁵ Again, the choice of jurisdiction shall not violate the provisions of the people's courts' tier and exclusive jurisdiction.⁹⁶

In cases involving foreign elements, a non-resident defendant may stipulate to the jurisdiction of a people's court by consent.⁹⁷ The consent need not be specifically made in writing, but may be assumed by the court through the defendant's filing of an answer to the complaint.⁹⁸ The defendant's failure to object is essential in defendant's consent to the people's court's jurisdiction.⁹⁹ Article 245 of the CPL provides that if the defendant raises no objection to the jurisdiction of a people's court and files its answer to the complaint in a civil action involving foreign elements, the defendant shall be deemed to have accepted the people's court's jurisdictional competence.¹⁰⁰

⁹⁰ *Id.* arts. 25, 244.

⁹¹ *See* CPL, *supra* note 2, art. 244.

⁹² *Id.*

⁹³ *See id.* art. 244.

⁹⁴ *See id.* art. 25.

⁹⁵ *Id.*

⁹⁶ *See* CPL, *supra* note 2, arts. 18–21, 25.

⁹⁷ *Id.* art. 244.

⁹⁸ *Id.* art. 245.

⁹⁹ *Id.*

¹⁰⁰ *See id.* art. 245.

D. *Exclusive Jurisdiction in the Chinese Courts*

The CPL expressly excludes foreign courts from exercising jurisdiction over certain civil actions over which the Chinese People's Courts shall have exclusive jurisdiction.¹⁰¹ The most prominent civil actions subject to the exclusive jurisdiction of the people's courts are disputes arising from contracts of foreign investment enterprises (FIEs).¹⁰² Article 246 of the CPL explicitly provides that the people's courts of China shall have exclusive jurisdiction over disputes concerning the performance within China of contracts of Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of natural resources.¹⁰³

In addition, certain actions shall be under the exclusive jurisdiction of a particular Chinese People's Court.¹⁰⁴ In accordance with Article 34 of the CPL, if: (1) a lawsuit involves a dispute over real estate, the people's court of the place where the real estate is located shall have jurisdiction; (2) a lawsuit involves a dispute over harbor operations, the jurisdiction shall rest with the people's court of the place where the harbor is situated; and (3) a lawsuit arises out of the dispute over succession, jurisdiction is proper where the decedent was domiciled upon his death, or where the major estate is located.¹⁰⁵

It is interesting to note that in a typical Chinese civil action, the jurisdictional matter is normally not addressed in either the plaintiff's complaint or the defendant's answer.¹⁰⁶ This phenomenon, in part, reflects the Chinese judicial tradition. In contrast to the adversarial model of the Anglo-American judicial system, the Chinese judicial system is premised on the inquisitorial model. Under the inquisitorial system, the court controls and shapes the litigation by conducting active and independent inquiry into the merits of the case. In the eyes of many parties, jurisdiction is often overlooked.

Since the defendant's failure to object constitutes consent to jurisdiction, it is imperative that defendants, foreign defendants in particular, raise a timely jurisdictional objection.¹⁰⁷ Under Article 38 of the CPL, if a party to a civil action objects to the jurisdiction of a peo-

¹⁰¹ See CPL, *supra* note 2, art. 246.

¹⁰² *Id.*

¹⁰³ *Id.* art. 246.

¹⁰⁴ See *id.* art. 34.

¹⁰⁵ See *id.*

¹⁰⁶ FOLSOM, *supra* note 28, 229–33.

¹⁰⁷ CPL, *supra* note 2, art. 38.

ple's court, the objection must be raised within the time period prescribed for the filing of answers.¹⁰⁸ According to Articles 113 and 248, defendant shall have fifteen days, or thirty days if residing outside the territory of China, to file his answer upon receipt of plaintiff's complaint.¹⁰⁹ Thus, if a defendant wants to challenge the people's court's jurisdiction, he must do so within this statutory fifteen-day or thirty day period.¹¹⁰ According to the Supreme People's Court, a third party to the litigation may also challenge the jurisdiction of a people's court if the third party has an independent claim.¹¹¹ Once the jurisdiction is challenged, the court shall have fifteen days to review the challenge and make a decision in the form of a court order.¹¹² A court order on jurisdictional matters is appealable.¹¹³

A number of Chinese scholars have strongly advocated introducing the doctrine of *forum non-conveniens* into the Chinese courts. In August, 2000, the China Society of Private International Law published the "Model Law of Private International Law of the People's Republic of China" (Model Law).¹¹⁴ Article 51 of the Model Law states that a Chinese People's Court may, at the request of a defendant, decline its jurisdiction over a civil action, which is lawfully under the jurisdiction of the court, if the court believes that the exercise of the jurisdiction will result in obvious inconvenience to the parties and another court would be more convenient.¹¹⁵

It seems in practice that the *forum non-conveniens* doctrine has gained some judicial recognition in the people's courts.¹¹⁶ This rec-

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* arts. 113, 248.

¹¹⁰ *Id.*

¹¹¹ Supreme People's Court, *Reply to the Matters Concerning Whether the Third Party May Object to the Jurisdiction*, 23 ZUIGAO RENMIN FAYUAN GONGBAO 22 (1990) [hereinafter 23 GAZETTE] (Chinese text).

¹¹² Supreme People's Court, *Several Rules on Strict Implementation of the Civil Procedure Law in the Course of Trial of Economic Cases*, 41 ZUIGAO RENMIN FAYUAN GONGBAO 17 (1994) [hereinafter 41 GAZETTE] (Chinese text).

¹¹³ CPL, *supra* note 2, art. 147.

¹¹⁴ MODEL LAW OF PRIVATE INTERNATIONAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 251 (2000) [hereinafter MODEL LAW]. The Model Law, published by China Law Press, is regarded as representing the most comprehensive provisions in Chinese private international law.

¹¹⁵ See *id.* art. 51.

¹¹⁶ See Supreme People's Court, *Notice on Several Notable Matters Concerning Adjudication of Civil and Commercial Cases Involving Foreign Elements and Enforcement*, Apr. 17, 2000, Supreme People's Court Doc., No. 51, 2000, ¶ 1. [hereinafter *Notice*]; WEI, *supra* note 10, at 393-402.

ognition, however, is limited.¹¹⁷ On April 17, 2000, the Supreme People's Court issued a "Notice on Several Questions in Adjudication and Enforcement Concerning Civil and Commercial Cases with Foreign Elements" to urge the Chinese People's Courts not to give up jurisdiction without reasonable cause.¹¹⁸ According to the Notice, it is required that the people's courts strictly follow the jurisdiction provisions of the CPL, and shall carefully review all jurisdictional matters in each case brought before them.¹¹⁹ It is further required that a people's court shall neither delay nor decline exercising judicial power over the case under its jurisdiction as provided by law.¹²⁰ But, if the parties to a civil litigation are all non-Chinese enterprises and the disputes have no practical connection with China, a people's court may advise the parties to choose alternative courts in other countries.¹²¹ In this case, litigation in the people's court would be deemed unrealistic in terms of the determination of evidence and enforcement of judgments.¹²²

One important aspect concerning jurisdiction of the people's courts is the arbitration clause or agreement. Under Article 257 of the CPL, the people's court's jurisdiction is excluded in disputes arising from foreign economic, trade, transport, or maritime activities if there is an arbitration clause in such contract, or if the parties to the contract have subsequently reached an arbitration agreement for dispute settlement.¹²³ Furthermore, pursuant to Article 259, a people's court shall have no jurisdiction over a case in which an award has been made by a foreign arbitration body.¹²⁴ However, these restrictions do not apply if the arbitration clause or agreement is found invalid or the arbitration award is set aside by court order.¹²⁵

Another factor affecting the people's courts' jurisdiction over foreign defendants is service of process. It is critical to note that service of process in China is deemed judicial conduct, and therefore only

¹¹⁷ See generally *Notice*, *supra* note 116, ¶ 1.

¹¹⁸ *Id.*

¹¹⁹ See *id.*

¹²⁰ *Id.*

¹²¹ See generally *id.* at 111.

¹²² See Li Guoguang, Vice-President of the Supreme People's Court, *Several Questions Concerning Trial Work in Economic Cases*, 57 ZUIGAO RENMIN FAYUAN GONGBAO 18 [57 GAZETTE] (1998).

¹²³ CPL, *supra* note 2, art. 257.

¹²⁴ See *id.* art. 259.

¹²⁵ See ARBITRATION LAW OF CHINA art. 65 (1994) (P.R.C.).

the court may serve process.¹²⁶ The CPL provides six methods of service, which include: (1) personal service upon defendant (also called direct service); (2) service left at the defendant's residence; (3) entrusted service through the court of the place where defendant resides; (4) service by mail; (5) service forwarded to defendant by defendant's work unit or authority; and (6) service by public notice.¹²⁷ Under the CPL, a receipt of service signed by the receiving person is required except for service made by public notice.¹²⁸

If a defendant resides outside China, the extraterritorial service shall be made through either: (1) the means as provided for by international treaties to which both China and the foreign country are members;¹²⁹ (2) the methods permitted by bilateral agreements for judicial assistance between China and the foreign country; or (3) diplomatic channels.¹³⁰

The Chinese People's Courts' jurisdiction can also be excluded by a statute of limitations. According to the Civil Code of 1986, except where otherwise provided by law, the limitations period for civil actions is two years from the date when plaintiff knows or should have known that his rights have been infringed.¹³¹ Under Article 136, the period is one year for actions involving: (1) personal injury; (2) sales of qualitatively substandard goods without proper notice; (3) delays in paying rent or refusal to pay rent; or (4) loss of or damage to property left in the custody of another person.¹³² Pursuant to the Contract Law of 1999, the time limit for actions concerning disputes over contracts for international sales of goods and import or export of technology is

¹²⁶ CPL, *supra* note 2, art. 77. This practice is sharply different from that in United States federal courts, where any person not a party to the action who is at least eighteen years old may serve process. See FED. R. CIV. P. 4(c)(2).

¹²⁷ CPL, *supra* note 2, arts. 77-84.

¹²⁸ See *id.* art. 79. In the case of service left at the defendant's resident, the receipt of service must be signed by a witness, who could be the representative of the local community office.

¹²⁹ *Id.* China became a member state of the 1965 Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters in March 2, 1991. Pursuant to the Convention, the designated "Central Authority" in China for purposes of extraterritorial service is the Ministry of Justice of China.

¹³⁰ See *id.* art. 247; *Opinions on CPL*, *supra* note 8, at 93.

¹³¹ See CIVIL CODE 1986, *supra* note 65, art. 135.

¹³² See *id.* art. 136.

four years.¹³³ In all others cases, the maximum time period is twenty years from the day on which the infringement occurs.¹³⁴

II. APPLICABLE LAW AND ITS DETERMINATION IN CIVIL CASES INVOLVING FOREIGN ELEMENTS

For civil litigation in a Chinese People's Court involving a foreign party, a threshold issue is what law the people's court should apply when rendering its decision. This question involves several different considerations, which include, *inter alia*: (1) whether the Chinese court could apply foreign law; (2) the factors considered in the determination of governing law; and (3) which law will govern if there is a conflict between the Chinese and foreign law.

Under the principle of judicial sovereignty, a court may only apply the law of the forum.¹³⁵ However, the emergence and development of conflict of law principles (commonly called "private international law" in China) has provided situations where foreign law could be applied in a domestic court. Debates on the rational grounds for the application of foreign law aside, such application has become a common practice in almost every country in the world. China is no exception.

Nevertheless, there is no unified conflict of law legislation in China. The choice-of-law rules are scattered in several laws and regulations. The most important choice-of-law rules are the Civil Law of 1986 and the Contract Law of 1999.¹³⁶ These two laws are the major pieces of legislation regulating civil and commercial matters in China and contain special provisions dealing with choice-of-laws in civil cases with foreign elements.¹³⁷ The choice-of-law rules provided in these

¹³³ See generally CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA 1999 art. 129, available at http://www.cclaw.net/lawsandregulations/chinese_contract_law.htm [hereinafter CONTRACT LAW].

¹³⁴ See CIVIL CODE 1986, *supra* note 65, art. 137.

¹³⁵ E. LORENZEN, SELECTED ARTICLES ON THE CONFLICTS OF LAWS 163-64 (1947).

¹³⁶ See CIVIL CODE 1986, *supra* note 65, art. 135. In addition, the Maritime Law of China, the Negotiable Instruments Law of China, and Civil Aviation Law of China also contain choice of law rules applicable to the specific matters involving maritime, negotiable instruments, and civil aviation, respectively. See generally MARITIME LAW OF CHINA 1992 art. 269, available at <http://www.gchinalaw.com/cnlaw/reference/codes/maritime.htm>; NEGOTIABLE INSTRUMENTS LAW OF CHINA 1995 ch. 6, available at <http://www.embonline.net/english/e-Law/C-5a-Bank-30.htm> [hereinafter LAW OF NEGOTIABLE INSTRUMENTS].

¹³⁷ See CIVIL CODE 1986, *supra* note 65, ch. 8; CONTRACT LAW, *supra* note 133, art. 126. Article 126 of the Contract Law provides choice of law rules applying to contract matters.

two laws are the combination of the rules previously used in judicial practice and theories advocated by legal scholars.¹³⁸

The Supreme People's Court's "Opinions on Several Questions Concerning Implementation of the General Principles of Civil Law (Provisional)" in 1988 was another major resource of the choice-of-law rules applied by the people's courts.¹³⁹ In China, both the Civil Code and the Supreme People's Court's "Opinions" are regarded as landmarks in the development of Chinese choice-of-law rules. These sources not only offer legitimate grounds for the people's courts to apply foreign law in a civil action involving foreign elements, but also provide the mechanisms for determining the applicable law.¹⁴⁰

A number of choice-of-law rules adopted in China are featured with western-styled content as well as internationally accepted principles such as the principle of "Party Autonomy." Some other rules clearly have their genesis in American conflict of law. The most notable example is the approach of the "closest relationship." This choice-of-law approach is actually a copy of the doctrine of the "most significant relationship" that is the main theme of the Restatement (Second) of Conflict of Laws.¹⁴¹

The Chinese People's Courts have sought to solve the choice-of-law issue in accordance with commonly practiced standards.¹⁴² In *Walt Disney Co. v. Beijing Press and Xinghua Bookstores*,¹⁴³ the defendants published nine fairytale books that contained the cartoon figure Mickey Mouse between 1991 and 1993. On January 31, 1994, plaintiff filed a lawsuit in Beijing No.1 Intermediate Court for copyright infringement. Defendants asked the court to dismiss the case and argued that plaintiff's did not have a valid copyright on Mickey Mouse in China under the Copyright Law of China 1990. The court rejected defendants' argument and held that, although Mickey Mouse was not published in China, it should be protected under the 1992 China-U.S.

¹³⁸ See generally *id.*

¹³⁹ Supreme People's Court, *Opinions on Several Questions Concerning Implementation of the General Principles of Civil Law (Provisional)*, 14 ZUIGAO RENMIN FAYUAN GONGBAO 16 (1988) [hereinafter 14 GAZETTE] (Chinese text); see also LEGISLATIVE WORKING COMMITTEE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF CHINA, COMPILATION OF CIVIL AND COMMERCIAL LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 508-12 (1999).

¹⁴⁰ See generally *id.*

¹⁴¹ RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 6, 145 (1994) [hereinafter RESTATEMENT].

¹⁴² See, e.g., CHINA RESEARCH INSTITUTE OF APPLICATION OF LAW, SELECTION OF CASES OF THE PEOPLE'S COURTS 1992-1999, INTELLECTUAL PROPERTY RIGHTS 124-37 (2000).

¹⁴³ See *id.*

Memorandum of Understanding on Protection of Intellectual Property Rights (1992 MOU). According to the Copyright Law of China, any work of a foreigner first published outside the territory shall be protected if the work is eligible for copyright protection under an agreement between China and the foreign country, or under an international treaty to which both countries are party. On that basis, the court applied the 1992 MOU. But in entering its judgment for plaintiff, the court further held that since the 1992 MOU was signed on March 13, 1992, it may only apply to the infringements that occurred after that date, and therefore plaintiff should not be entitled to copyright protection against defendants' 1991 publication.¹⁴⁴

Choice-of-law rules in China emphasize an actual connection or relationship between the applicable law and the nature of the case involved.¹⁴⁵ A closer look at the choice-of-law provisions in the Civil Code of China and the 1988 Supreme People's Court "Opinions" clearly reveal that the "closest relationship" is the most determinative factor in the choice of law.¹⁴⁶ This factor applies not only to restrict the parties' freedom of choice of applicable law, but also to solve the choice of law puzzle posed by the factual complexity of certain cases.¹⁴⁷ Moreover, the closest relationship test is also the identifier of applicable law when a foreign country, whose law should be applied, has plural legal systems.¹⁴⁸

The choice-of-law rules in both the Civil Code of China and the 1988 Supreme People's Court "Opinions" are criticized for being incomplete.¹⁴⁹ Unsatisfied with the scattered choice-of-law legislation, many call for a comprehensive conflict of law code.¹⁵⁰ In 2000, the China Society of Private International Law published the "Model Law,"¹⁵¹ a remarkable attempt to codify the choice-of-law rules. Of the total 166 articles in the Model Law, ninety-four articles directly deal

¹⁴⁴ *Id.*

¹⁴⁵ 14 GAZETTE, *supra* note 139, at 35.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Under the Supreme People's Court's 1988 "Opinions," when a foreign law is applied, if there are different laws that are applied to different parts of the country, the applicable law shall be determined according to the conflict of law rules of the country. If the foreign country has no such rules, the law of the place that has the closest relationship with the civil relations involved shall be applied directly.

¹⁴⁹ See generally Han Depei & Du Tao, *The Recent New Development In the Legislation of the Private International Law*, in 3 CHINESE YEARBOOK OF PRIVATE INTERNATIONAL LAW AND COMPARATIVE LAW 34 (2000).

¹⁵⁰ See *id.*

¹⁵¹ See generally, MODEL LAW, *supra* note 114; JIN, *supra* note 5, at 32.

with the application of law.¹⁵² There is a wide-range of coverage of choice-of-law matters, including nationality and domicile, capacity, formality of conducts and agency, statute of limitations, personal rights, property rights, intellectual property rights, contract, torts, unjust enrichment and *negotiorum gestio* (abstract action), domestic relations, inheritance, bankruptcy, and arbitration.¹⁵³

Of course, it is necessary to emphasize that China is a country with a typical civil law tradition. In this sense, the people's courts may only apply the "black letter" rules. Therefore, the Model Law, however significant, may not become applicable unless and until it is adopted by the Chinese legislature. To be clear, the basic choice-of-law rules that the people's courts currently apply can be summarized from the following perspectives.

A. *Choice of Law in Contract—Party Autonomy*

Similar to most other countries, China adopts the "Party Autonomy" doctrine that allows parties to choose the governing law for their contract.¹⁵⁴ Both the Civil Code of 1986 and the Contract Law of 1999 provide that the parties to a foreign contract may choose the law applicable to settlement of disputes arising from the contract, except as otherwise stipulated by law.¹⁵⁵ In the absence of such a choice, the law of the country to which the contract is most closely related shall apply.¹⁵⁶

The contractual parties' freedom on choice of law is limited. First, the foreign law chosen by the parties shall be excluded if its application would harm the social and public interests of China.¹⁵⁷ Second, the choice of law must be expressly made by the parties with mutual consent and may not be implied.¹⁵⁸ Third, the choice shall not be made in violation of the rules mandating application of Chinese law.¹⁵⁹ The mandatory application mainly deals with the contracts of foreign investment enterprises, such as Chinese-foreign joint ventures and contracts for Chinese-foreign cooperative exploration and development of natural resources. These contracts may only be governed

¹⁵² MODEL LAW, *supra* note 114.

¹⁵³ See generally *id.*

¹⁵⁴ CPL, *supra* note 2, art. 25.

¹⁵⁵ See CIVIL CODE 1986, *supra* note 65, art. 145.

¹⁵⁶ *Id.*

¹⁵⁷ CPL, *supra* note 2, art. 244.

¹⁵⁸ *Id.* (requiring an agreement to be in writing).

¹⁵⁹ *Id.*

by Chinese law. Also, under the Detailed Rules (as amended 2001) for Implementation of the Law of China on Wholly Foreign-Owned Enterprises (WFOE), a contract between a WFOE and another company, enterprise, other economic organization, or individual shall be exclusively governed by the Contract Law of China.¹⁶⁰

With respect to the time for the parties to make a choice of applicable law, the Supreme People's Court took a flexible approach. According to the Supreme People's Court, the parties may choose the governing law through a choice-of-law clause in their contract or by agreement reached after the contract is made.¹⁶¹ The contract disputes for which the parties may choose the governing law include those concerning conclusion of contract, time for the conclusion, interpretation of contract terms, performance of contract, modification, suspension, assignment, dissolution, and termination of contract.¹⁶²

If there is no expressed choice-of-law, the people's courts will use the "closest relationship" standard to determine which law is to be applied.¹⁶³ This standard focuses on the nature of contract and type of transaction.¹⁶⁴ Though the term closest relationship is neither defined in the Civil Code of 1986 nor the Contract Law of 1999, in practice, the people's courts normally follow the guidance set forth by the Supreme People's Court in 1987.¹⁶⁵ This guidance provides a list of laws

¹⁶⁰ See generally MOFTEC, *Detailed Rules on Implementation of the Law of China on Wholly Foreign-owned Enterprises*, arts. 81, 84 (amended April 21, 2001), available at <http://www.chinafdi.gov.cn/lawsen/display.asp?id=9>.

¹⁶¹ Supreme People's Court, *Answers to Several Questions on Application of Foreign Economic Contract Law*, 12 ZUIGAO RENMIN FAYUAN GONGBAO 3, 4 (1987) [hereinafter 12 GAZETTE] (Chinese text); see DEPEI, *supra* note 5, at 198–99.

¹⁶² See 12 GAZETTE, *supra* note 161, at 4.

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* For other contracts, the laws determined by the people's courts under the closest relationship standard shall be as follows: (1) contract for bank loan or guarantee—law of the place where the bank is located; (2) insurance contract—law of the place of insurer's business office; (3) contract for product processing and work—law of the place where the contractor's business office is situated; (4) contract of transfer of technology—law of the place of transferee's business office; (5) contract for construction project—law of the place of the project; (6) contract for technical consultation or design—law of the place where the commissioning party's business office is located; (7) contract for service—law of the place of service performance; (8) contract for supply of equipment—law of the place where the equipment is installed and operated; (9) contract of agent—law of the place of the agent's business office; (10) contract for lease, sale, or mortgage of real property—law of the place of property; (11) contract of the leasing of chattels—law of the place of lessor; (12) contract for storage and warehousing—law of the place where the storekeeper's business office is located. See *id.*

applicable to the different contracts pursuant to the closest relationship test.¹⁶⁶ For example, under its guidance, absent parties' choice of applicable law, a contract for the international sale of goods shall be governed by the law of the place of the seller's business office at the time of contract conclusion. If the contract was concluded at the place of the buyer's business office, or the contract is made mainly according to the terms and conditions stipulated by the buyer or on the basis of the buyer's bidding request, or the contract clearly provides that the seller shall deliver the goods at the place of the buyer's business office, the law of the place of the buyer's business office at the time of contract conclusion shall apply.¹⁶⁷

Notwithstanding this guidance, a people's court may apply the law of the place to which the contract was found to be the most closely related.¹⁶⁸ If the law of a party's business place shall be applied and the party has more than one business office, the people's courts shall apply the law of the place that is found to be more closely related to the contract.¹⁶⁹ If there is no such business office, the law of the party's domicile or residence shall be applied.¹⁷⁰ It is worthwhile to note that the applicable law, either chosen by the parties or determined by a people's court, shall refer to the existing substantive law, not including the conflict of law rules nor the procedural law.¹⁷¹

B. *Applicable Law in Torts—Lex Delicti*

The determination of law applicable to torts in the people's courts is based on the doctrine of *lex delicti*—the law of the place of tort.¹⁷² This doctrine is adopted in Article 146 of the Civil Code of 1986.¹⁷³ This provision recites three general rules: (1) the law of the place where the tortious conduct is committed shall apply; (2) if both parties involved in the tort are citizens of the same country or are domiciled in the same country, the law of the parties' own country or domicile may be applied; and (3) if the conduct committed outside the territory of China is not regarded as tortious conduct under the

¹⁶⁶ See 12 GAZETTE, *supra* note 161, at 5.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See 12 GAZETTE, *supra* note 161, at 5. This is to avoid the problems of renvoi in the choice of law. See *id.*

¹⁷² See CIVIL CODE 1986, *supra* note 65, art. 146.

¹⁷³ See *id.*

law of the People's Republic, such conduct shall not be treated as a tort.¹⁷⁴

In its 1988 "Opinions" on the implementation of the Civil Code, the Supreme People's Court further illustrated that the law of the place of tort as provided in the Civil Code includes both the law of the place where the tortious conduct is committed and the law of the place where the resultant harm occurs.¹⁷⁵ The Supreme People's Court also opined that if the place of conduct is different from the place of harm, the people's courts may at its sole discretion determine the law to be applied.¹⁷⁶

C. Law Governing Real Property—*Lex loci rei sitae*

In a lawsuit involving real property, the people's courts will apply the law of the place of the property—*lex loci rei sitae*.¹⁷⁷ Article 144 of the Civil Code of 1986 provides that in disputes involving the ownership of real property, the law of the place where the property is situated shall apply.¹⁷⁸ This doctrine also applies to real property in intestate succession.¹⁷⁹

However, the Civil Code of 1986 does not make clear what shall be included in the ownership of real property for choice of law purposes, nor does the Civil Code offer a definition of the term "real property." According to the 1988 Supreme People's Court "Opinions," real property shall refer to land, construction affixed to land, other fixtures, as well as equipment fixed to the construction.¹⁸⁰ The Supreme People's Court also extended the law of the place of real property to govern the civil relations concerning the ownership, sale, lease, mortgage, and use of the real property.¹⁸¹ In addition, as noted above, the law of the place of real property may also apply to a contract for lease, sale, or mortgage of real property.¹⁸²

With regard to the question about characterization or classification of real property, there exists no provision in the Chinese

¹⁷⁴ See *id.*

¹⁷⁵ See 14 GAZETTE, *supra* note 139, at 35.

¹⁷⁶ See *id.*

¹⁷⁷ See CIVIL CODE 1986, *supra* note 65, art. 144.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* art. 149. According to Article 149, in intestate succession, movable property shall be governed by the law of the decedent's last place of domicile, and real property shall be governed by the law of the place where the property is located.

¹⁸⁰ See 14 GAZETTE, *supra* note 139, at 35.

¹⁸¹ See *id.* at 35.

¹⁸² See 12 GAZETTE, *supra* note 161, at 5.

laws.¹⁸³ A common approach advocated by most Chinese private international law scholars is that the law of the place of property determines the issue of the property characterization.¹⁸⁴

An exception to the doctrine of *lex loci rei sitae* is presented by property ownership over vessels.¹⁸⁵ In accordance with the Maritime Law of China 1992, the matters concerning the acquisition, transfer, or termination of property ownership over a vessel shall be governed by the law of the vessel's flag country.¹⁸⁶

D. Law Determining Civil Capacity—*Lex Personalis*

Lex Personalis, or the law of person, is a recognized choice-of-law principle governing the issues of civil capacity.¹⁸⁷ It refers to both the law of domicile and the law of own country.¹⁸⁸ In general, civil capacity is regarded as a prerequisite for taking civil actions because it is the matter directly affecting the establishment of the civil relations that are involved.¹⁸⁹

In China, the most notable provision under which the people's courts determine the law applicable to civil capacity is Article 143 of the Civil Code of 1986.¹⁹⁰ Article 143 provides that if a citizen of China resides in a foreign country, the law of that country may apply to determine his capacity for civil conduct.¹⁹¹ This provision, however, has been criticized by many private international law scholars because of its inadequacy in handling civil capacity issues.¹⁹² On the one hand, Article 143 only deals with Chinese citizens and does not contain rules that could be generally applied to non-Chinese.¹⁹³ Also, there is lacking a provision concerning the determination of civil capacity of a legal persons.¹⁹⁴ Moreover, it is unclear whether the residing country actually means the country of domicile.¹⁹⁵

¹⁸³ See, e.g., JIN, *supra* note 5, at 251–253.

¹⁸⁴ See *id.*

¹⁸⁵ MARITIME LAW OF CHINA, *supra* note 136, art. 270.

¹⁸⁶ *Id.*

¹⁸⁷ See generally CIVIL CODE 1986, *supra* note 65, art. 143.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ *Id.*

¹⁹² See CIVIL CODE 1986, *supra* note 65, art. 143.

¹⁹³ See *id.*

¹⁹⁴ LIKUN, *supra* note 5, at 205–227.

¹⁹⁵ See generally *id.*

In 1988, the Supreme People's Court attempted to overcome the shortcomings of Article 143 by offering more specific guidance in the determination of the law governing civil capacity and status.¹⁹⁶ Indeed, the court afforded several rules that became heavily influential in the practice of the people's courts. These rules are:

1. The capacity for civil conduct of a Chinese citizen residing in a foreign country shall be determined by Chinese law if such conduct occurs in China. The law of a foreign country in which the Chinese citizen resides may apply if the conduct occurs in such foreign country.

2. If a foreigner who conducts civil activities in China is deemed to have no capacity for civil conduct under the law of his own country but has such capacity under Chinese law, he shall be regarded as having capacity for civil conduct.

3. The capacity for civil conduct of a stateless person shall, in general, be governed by the law of the country where he resides, or the law of the country of his domicile if he does not reside in that country.¹⁹⁷

4. A legal person's capacity for civil conduct shall be determined by the law of its own country, which is the country where the legal person is registered.¹⁹⁸

Another provision concerning civil capacity is Article 97 of the Law of Negotiable Instruments of China 1995.¹⁹⁹ It provides that the obligor's capacity for civil conduct shall be determined by the law of his own country.²⁰⁰ If the obligor is regarded to have no capacity or have limited capacity under the law of his own country but has full capacity under the law of place of conduct, the law of place of conduct shall apply.²⁰¹

E. Determination of Foreign Law—Burden of Proof

There should be no question about application of foreign law in the people's courts unless such application would violate the public

¹⁹⁶ See 14 GAZETTE, *supra* note 139, at 35.

¹⁹⁷ The Supreme People's Court tries to differentiate "residing place" from "domicile." See generally *id.*

¹⁹⁸ See *id.*

¹⁹⁹ LAW OF NEGOTIABLE INSTRUMENTS, *supra* note 136, art. 97.

²⁰⁰ *Id.*

²⁰¹ *Id.*

interest of China²⁰² or evade Chinese mandatory laws or prohibitive rules.²⁰³ Difficult issues arise, however, as to how the contents of the applicable foreign law will be determined. The complexity involved in this regard is how the foreign law should be treated; this would also affect who will have the burden to prove the foreign law.

Two contradictory approaches have governed the question concerning the determination of foreign law. One is a common law approach, under which foreign law is treated as a matter of fact pleadable as such by evidence supplied by the parties, their attorneys, or experts.²⁰⁴ The other is a continental law approach, in which foreign law is regarded as a matter of law and the court has the obligation to apply it.

The Chinese People's Courts seem to be positioned between these two extremes. The axiom, as provided in Article 7 of the CPL, is that in the adjudication of civil cases, the people's courts must "base itself on the facts and take the law as the criterion."²⁰⁵ Therefore, the people's courts are required to look into both fact and law in any civil case.²⁰⁶ The underlying notion is that a court shall make every effort to ensure errorless ascertainment of facts and application of law.²⁰⁷

A people's court may determine the foreign law through such means as: (1) the parties to litigation; (2) the central authority of contracting country under the agreement of judicial assistance between China and the foreign country; (3) the Chinese embassy or consulate in the foreign country; (4) the foreign country's embassy or consulate in China; or (5) Chinese or foreign legal experts.²⁰⁸

If, however, the foreign law cannot be determined through the above means, Chinese law shall be applied.²⁰⁹ In addition, should ei-

²⁰² See CIVIL CODE 1986, *supra* note 65, art. 150. Under Article 150 of the Civil Code 1986, the application of foreign law or international practice shall not violate the public interest of the People's Republic of China. *Id.*

²⁰³ See 14 GAZETTE, *supra* note 139, at 36. According to the Supreme People's Court, there shall be no application of foreign law if the application is aimed at evading mandatory law or prohibitive rules of China. *Id.*

²⁰⁴ For the American approach, see generally *Walton v. Arabian American Oil Co.*, 233 F.2d 541, 544 (2d Cir. 1956); *Leary v. Gledhill*, 84 A.2d 725, 728 (N.J. 1951); FED. R. CIV. P. 44.1; RESTATEMENT, *supra* note 141, § 136.

²⁰⁵ See CPL, *supra* note 2, art. 7.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See 14 GAZETTE, *supra* note 139, at 36.

²⁰⁹ See *id.*

ther party disagree with a trial-level people's court determination on foreign law, the party may appeal to the appellate court for review.²¹⁰

III. ENFORCEMENT OF JUDGMENTS IN THE CHINESE PEOPLE'S COURTS

In a broad sense, enforcement of judgments in international civil litigation embraces two aspects. The first aspect is to enforce the judgment entered by a domestic court of a country, and the second involves recognition and enforcement of foreign judgments. In many cases, it also involves enforcement of foreign arbitral awards. More importantly, given the nature of judicial sovereignty, a judgment of one country's courts does not automatically gain extraterritorial recognition and enforcement in another country. This matter may only be resolved through a special channel, which is commonly called "international judicial assistance."

A. *Enforcement of People's Courts' Judgments*

The CPL provides a number of devices by which a people's court judgment may be satisfied. In general, the enforcement is divided into (a) enforcement against property, and (b) enforcement against required activities. Enforcing a judgment against property is called execution. Under the CPL, the available means for execution include inspection, freezing, and transfer of judgment debtor's deposits,²¹¹ withholding and withdrawal of judgment debtor's income;²¹² sequestration, seizure, freezing, public auction, and sale of judgment debtor's property;²¹³ and eviction and return of land.²¹⁴ The enforcement against required activities involves forced delivery of specified value instruments or certificates,²¹⁵ and forced performance of acts as specified in the judgment.²¹⁶ Additionally, for purposes of enforcing judgments, the CPL also provides certain protective measures, which include search,²¹⁷ issuance of certificates for the transfer of property rights,²¹⁸ as well as monetary penalties for delayed payment.²¹⁹

²¹⁰ See CPL, *supra* note 2, art. 148.

²¹¹ See *id.* art. 221.

²¹² See *id.* art. 222.

²¹³ See *id.* art. 223.

²¹⁴ See *id.* art. 229.

²¹⁵ See CPL, *supra* note 2, art. 228.

²¹⁶ See *id.* art. 231.

²¹⁷ See *id.* art. 227.

²¹⁸ See *id.* art. 230.

²¹⁹ See *id.* art. 232.

There are two ways to initiate the process of enforcement in the people's courts. The first, and more common, one is the "enforcement by petition" made by the judgment creditor.²²⁰ If the judgment debtor refuses to satisfy the people's court judgment, the judgment creditor may file a petition for enforcement of the judgment with a competent people's court.²²¹ The enforcement petition may be made in writing or orally if the petitioner has difficulty writing.²²² When making the petition, the petitioner provides the people's court with documents stating the reasons and items for enforcement, as well as a copy of the court judgment. The petitioner may also need to furnish information about the financial status and property of the judgment debtor.²²³ The time limit for the judgment enforcement petition is one year, if at least one party is citizen, or six months, if all parties are legal persons or other organizations.²²⁴

Enforcement may also be triggered by referral of the judge in the case, which is called "judge-referred enforcement." The enforcement under the judge's referral, however, is limited to legal documents such as judgments, orders, and mediation papers made by the people's court only.²²⁵ In 1998, the Supreme People's Court adopted the "Rules (Provisional) on Several Matters Concerning Enforcement Work in the People's Courts."²²⁶ Under these Rules, a judge may refer for enforcement: (1) judgments for child support, alimony, pension, medical expenses, and salaries; (2) legal documents made by the people's courts in criminal proceedings containing property-related civil judgments, orders, and mediation papers; (3) court orders pertaining to attachment and advance execution; (4) court decisions on fines and detention; and (5) civil judgments and orders made by the people's court concerning major interests of China.²²⁷

²²⁰ See CPL, *supra* note 2, art. 216.

²²¹ *Id.* art. 207. For purposes of judgment enforcement, the competent people's court refers to: (1) the first instant trial court if the judgment is property-related; (2) the ordering court if the enforcement involves the court order for payment; (3) the intermediate people's court when recognition and enforcement of foreign judgment is requested; and (4) a people's court at the place of judgment debtor or place where judgment debtor's property is located if the request is to enforce arbitral award. *Id.*

²²² *See id.*

²²³ See Supreme People's Court, 55 ZUIGAO RENMIN FAYUAN GONGBAO 93 (1998) [hereinafter 55 GAZETTE] (Chinese text).

²²⁴ See CPL, *supra* note 2, art. 219.

²²⁵ *See id.* art. 216; *see also* WEI, *supra* note 10, at 358–59.

²²⁶ 55 GAZETTE, *supra* note 223, art. 92.

²²⁷ *Id.*

In the people's courts, enforcement of a judgment is executed by an enforcement officer.²²⁸ Many people's courts have formed an enforcement division in charge of judgment execution.²²⁹ Upon receipt of a petition or judge referral for enforcement, the enforcement officer or division sends the execution notice to the judgment debtor, instructing him or her to comply with the judgment within a specified period of time. If the judgment debtor fails to comply, the enforcement officer may explore other enforcement devices to compel the debtor to satisfy the judgment.²³⁰

However, if the judgment debtor or their property is not within the territory of China, the judgment creditor may directly apply to a competent foreign court for enforcement. If necessary, the people's court may also send the enforcement request to a foreign court under the provisions of bilateral or international treaties to which both China and the foreign country are members. Absent these treaties, the request may be made on the basis of reciprocity.²³¹ If required by a foreign court, the people's court may issue a certificate of judgment to the judgment creditor.²³²

B. *Recognition and Enforcement of Foreign Judgments and Arbitral Awards*

Articles 267 and 268 of the CPL provide the process to enforce foreign judgments by the people's court.²³³ There are two alternatives to start the process: (1) the foreign judgment creditor may file a petition directly with the competent people's court for recognition and enforcement of the judgment; or (2) the foreign judgment court may make a judgment recognition and enforcement request to the competent people's court.²³⁴ Note that the foreign court request in this regard shall be directed to the competent people's court through the means provided in the treaties to which both China and the forum country have joined, or on the basis of reciprocity. If neither treaty nor reciprocity exists, a diplomatic channel is usually employed. For purposes of the recognition and enforcement of a foreign judgment,

²²⁸ See CPL, *supra* note 2, art. 209.

²²⁹ See *id.*

²³⁰ See *id.* art. 220.

²³¹ See *id.* art. 266.

²³² See generally *Opinions on CPL*, *supra* note 8.

²³³ See CPL, *supra* note 2, arts. 267, 268.

²³⁴ See *id.* art. 267.

the competent court shall be the intermediate people's court of the place where the judgment debtor resides or his property is located.²³⁵

Upon receipt of the judgment recognition and enforcement petition or request, the intermediate people's court shall examine and review the foreign judgment on the basis of international treaties to which China is a member, the principle of reciprocity, or relevant Chinese law.²³⁶ The examination and review, however, is limited to the formality of the foreign judgment without questioning the merits of the foreign court's determination of facts and application of law.²³⁷ After the examination and review, the people's court may issue an order of recognition or a writ of enforcement provided the foreign judgment does not contradict basic principles of Chinese law nor violates Chinese sovereignty, public security, or social interests.²³⁸

The CPL does not dictate the conditions under which a people's court may refuse to recognize and enforce a foreign judgment. In practice, however, the people's courts may strike down a petition or request for recognition and enforcement if the foreign judgment is found to have one of the following defects:

(1) the foreign judgment was made by an incompetent foreign court according to relevant provisions of international treaties and Chinese laws,

(2) the foreign judgment has not taken effect or has no effect at all under the law of such foreign country,

(3) the defendant was not given adequate notice for the proceedings, or was not properly represented by a guardian if lacking legal capacity,

(4) an effective judgment has been made by a people's court for the same cause of action between the same parties, or the case was in the middle of trial in a people's court and the trial had begun before the proceedings in the foreign court started, or

²³⁵ See generally *Opinions on CPL*, *supra* note 8.

²³⁶ See 14 GAZETTE, *supra* note 139, at 35. The People's Court shall first look at the international treaties that China has joined. If there are no such treaties, the principle of reciprocity controls. Absent both treaties and reciprocity, the relevant Chinese law shall apply. *Id.*

²³⁷ See WEI, *supra* note 10, at 434-436.

²³⁸ See CPL, *supra* note 2, art. 268.

(5) recognition and enforcement of the foreign judgment would cause harm to Chinese sovereignty, security, and public order.²³⁹

On December 1, 1992, the Supreme People's Court issued its "Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court."²⁴⁰ These Opinions specifically address the recognition of foreign divorce judgments sought by Chinese citizens as well as foreigners. The Supreme People's Court emphasizes that a people's court should not decline to take action on the recognition petition submitted by a Chinese citizen even though the marriage was concluded outside China.²⁴¹ But, if the judgment was made in default, the petitioner shall provide the people's court with evidence that the defendant was properly notified of the divorce action.²⁴² According to the Supreme People's Court, a people's court may deny a foreigner's petition for recognition of their divorce judgment if their spouse is not a Chinese citizen.²⁴³

With respect to a foreign arbitral award, Article 269 of the CPL provides a similar procedure to that for the recognition and enforcement of foreign judgments.²⁴⁴ A major difference is that only the parties to the arbitration may initiate the process by submitting the petition directly to the intermediate people's court of the place where the award debtor resides or property is located.²⁴⁵ In addition, since China is a member state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention),²⁴⁶ in nearly all cases recognition and enforcement of foreign

²³⁹ See WEI, *supra* note 10, at 436; see also LIKUN, *supra* note 5, at 458–459. The provisions in this regard are also embodied in the bilateral treaties for judicial assistance between China and a number of foreign countries.

²⁴⁰ Supreme People's Court, *Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court*, 64 ZUIGAO RENMIN FAYUAN GONGBAO 61 (2000) [hereinafter 64 GAZETTE] (Chinese text).

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See CPL, *supra* note 2, art. 269.

²⁴⁵ See *id.*

²⁴⁶ China joined the New York Convention on April 22, 1987 with two reservations: (1) The People's Republic of China will apply the Convention only on the basis of reciprocity, to the recognition and enforcement of arbitral awards made in the territory of another Contracting State; and (2) The People's Republic of China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the People's Republic of China. At the pres-

arbitral awards are subject to the conditions set forth in the Convention.²⁴⁷

*C. Practical Concerns in Seeking Enforcement of Judgments
in the People's Courts*

The enforcement of court judgments in China is difficult. Each year a considerable number of court judgments or orders are not enforced. It is obvious that this sluggishness in enforcing judgments, including arbitral awards, in China has become a major concern for many foreign companies. Though the Supreme People's Court is under tremendous pressure to resolve this problem, the result still is far from optimal. Partly because of this reason, during the past two gen-

ent, there are some 113 member-states of the New York Convention. The full text of the Convention may be found at 9 U.S.C. § 201.

²⁴⁷ Under Article V of the New York Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(1) The parties to the agreement referred to in Article II were, under the law applicable to them, some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(2) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(3) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(4) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(5) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

The recognition or enforcement of the award would be contrary to the public policy of that country.

See generally id.

eral sessions of the National People's Congress, the Supreme People's Court barely survived approval of its working report to the Congress.²⁴⁸

It is unfair, however, to blame the Supreme People's Court alone on this matter, and many factors attribute to the problem of enforcement difficulty. Local protectionism is the main obstacle to enforcement. As noted, since China adopts a two-instance system of adjudication, a majority of cases conclude in intermediate courts situated at the level of prefecture between county and province. The enforcement of domestic judgments normally rests with the trial courts, county courts in many cases, unless an intermediate court conducts the first instance trial. When a civil case involves different counties or prefectures, the trial court encounters local government influence driven by local interests such as the desire or policy to protect local industries or businesses. The more local interests are involved, the more difficult it is to enforce a judgment against a local party. In case of enforcing foreign judgments against a local party, such protection could become more dominant.

A second factor hindering enforcement is government interference in favor of state-owned enterprises (SOE). If a SOE is a judgment debtor, the enforcement of a judgment may be halted if such SOE is financially unable to satisfy the judgment or the enforcement would threaten the survival of the SOE. The interesting phenomenon is that many SOEs in China are both creditors and debtors. More importantly, a SOE may not sell or be forced to sell its assets to satisfy a court judgment.

The third factor is a lack of credit-checking and asset-tracking systems. In many cases, it is very difficult, if not impossible, to obtain a judgment debtor's financial and asset information, especially for a foreign judgment creditor. Under the CPL, a request for recognition and enforcement of a foreign judgment shall be submitted to the intermediate people's court of the place where the judgment debtor resides or his property is located.²⁴⁹ Quite often, however, the judgment debtor disappears in order to evade the judgment, and his assets, including bank accounts, are all transferred to an undisclosed place.

²⁴⁸ In both the 2000 and 2001 annual sessions of the National People's Congress, the Supreme People's Court received some 40% disapproval votes from the deputies for its working report.

²⁴⁹ CPL, *supra* note 2, arts. 207, 209.

The fourth factor is the lower court's abuse of discretion. For example, when recognition and enforcement of foreign arbitral awards are requested, lower Chinese courts often arbitrarily decide to set aside the awards. In order to curb this practice, the Supreme People's Court established a pre-reporting system under which a decision on whether an arbitral award is to be recognized and enforced shall be reported to the Supreme People's Court for review. No decision shall be made before the Supreme People's Court review is complete.²⁵⁰

The language barrier might be another factor. For a foreign judgment to be enforced in China, it is required that the judgment be translated to the Chinese language. Therefore, any mistranslation in the parties' name or address may result in a failure of recognition and enforcement because it could constitute a ground on which the judgment debtor denies the judgment.

IV. JUDICIAL INDEPENDENCE—CHALLENGES FACING THE CHINESE JUDICIAL SYSTEM

A fundamental issue that affects international civil litigation in China is the lack of judicial independence. This issue not only troubles foreign companies, investors, and businessmen, but also becomes a popular concern among Chinese citizenry. Despite the increasingly strong voice calling for an independent judicial system, the people's courts still seems to face impassable hurdles to exercising their judicial power independently.

Indeed, it is fair to say that judicial independence is a recognized principle in the Chinese Constitution and laws. In 1954, when the first Constitution was adopted,²⁵¹ it provided that the people's courts shall adjudicate cases independently and abide by law.²⁵² Article 126 of the current Constitution, adopted in 1982 (as amended 1999), further provides that the people's courts shall exercise judicial power independently according to stipulation of law, free of any interference by administrative agencies, social organizations, or individuals.²⁵³ Similar

²⁵⁰ See *Notice*, *supra* note 116.

²⁵¹ China adopted four Constitutions in 1954, 1975, 1978, and 1982, respectively. The current one is the 1982 Constitution, and it was amended three times in 1988, 1993, and 1999.

²⁵² See XIANFA art. 78 (1954) [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1954)] [hereinafter XIANFA (1954)].

²⁵³ See XIANFA, art. 126 (1982) [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1982)], available at <http://www.qis.net/chinalaw/lawtran1.htm> [hereinafter XIANFA (1982)].

provisions are also embodied in the 1979 Organic Law of the People's Courts (as amended 1983),²⁵⁴ the 1995 Law of Judges (as amended 2001),²⁵⁵ as well as the CPL.²⁵⁶

Therefore, literally speaking, the people's courts are granted an independent judicial power under the Chinese Constitution and laws. The problem, however, is that the judicial power may not be exercised independently in practice. Even the Supreme People's Court's activities are not completely free from interference. The cause is the inherent defects existing in the current judicial system. China is a communist-party-dominated socialist country, and separation of powers is not a dominant theme. The People's Congress is the basic organization of the nation's political power.²⁵⁷ According to the 1982 Constitution (as amended 1999), the National People's Congress (NPC) is the highest body of state power. But this body is required to be under the leadership of the communist party.²⁵⁸ The Supreme People's Court, though defined as the nation's top judiciary body, is required to report to the NPC. Under the NPC, there are local people's congresses at the province and county level to which the lower people's courts at corresponding level are responsible.²⁵⁹

Additionally, there are several system defects. The first one is the current organizational structure of the judicial system, which makes judicial independence extremely difficult. As noted, China has a unitary judicial system with four levels, from the Supreme People's Court to the county trial courts. The Supreme People's Court, however, has no control over any of the lower courts except for work connections.

²⁵⁴ Article 4 of the Organic Law of the People's Courts is an exact copy of Article 126 of the 1982 Constitution. See XIANFA (1982), *supra* note 253, art 126; ORGANIC LAW, *supra* note 13, art. 4; see also LEGISLATIVE WORKING COMMITTEE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF CHINA, LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 38-42 (1999).

²⁵⁵ The Law of Judges of China was adopted on February 28, 1995 and amended on June 30, 2001. In Article 1 of the law (as amended), it states that purpose of the law is to safeguard the independent exercise by the people's courts of judicial power and judicial justice. Article 8 provides that a people's court judge shall have the right to adjudicate cases independently without interference by administrative agencies, social organizations, and individuals. See ZHONG HUA REN MIN GONG HE GUO FA GUAN FA [LAW OF JUDGES OF CHINA] (1995), art. 1, 8, available at http://www.law-lib.com/law/law_review.html [hereinafter LAW OF JUDGES].

²⁵⁶ See CPL, *supra* note 2, art. 6. Under the CPL, the people's courts shall exercise judicial power over civil cases independently without interference by administrative agencies, social organizations, and individuals. *Id.*

²⁵⁷ See generally XU CONGDE, CONSTITUTION 102-36 (1999).

²⁵⁸ See *id.* at 117-18.

²⁵⁹ See *id.*

All judges at the lower people's court are selected and appointed by the local people's congress, which is heavily influenced by the local communist party chief and government heads. More importantly, the operating expenses, including salaries of the judges, are provided from the local government budget. In addition, Chinese judges do not have a life term, and any of them could be replaced or removed at anytime by the local people's congress.²⁶⁰ It is, therefore, quite common for local judges to follow instructions and opinions from the local government on particular cases, since government and judicial powers are usually intertwined.²⁶¹

The second aspect that affects judicial independence is the lack of professional ethics and judicial corruption. In China, personal relationships or "back-door" connections play significant roles in every corner of society. This scenario is often seen in the adjudication of cases. Many Chinese lawyers spend much of their time trying to find easy access to the presiding judge in lieu of traditional legal analysis.

A third shortcoming involves the internal managerial system of the people's courts. Within the people's courts, the president of each court is both the chief judge and the chief executive. The president has the power to influence the promotion and demotion of any particular judge in the court, and to supervise all judges through a reporting system. In most cases, the local people's court president is a political appointee by the local government.²⁶² In addition, though cases are tried by a collegial panel, the panel's decision is subject to review by the trial committee consisting of the president, vice presidents, and division directors. Thus, the ability of the judge or collegial panel to reach an independent decision on a case is considerably limited.

Furthermore, the professional quality of judges is often very poor. Among the presidents and vice-presidents of the people's courts, only 19.1% received a bachelor degree or higher.²⁶³ This ratio is down to 15.4% among the judges in the lowest courts.²⁶⁴ For those

²⁶⁰ LAW OF JUDGES, *supra* note 255, arts. 34–36.

²⁶¹ In Chinese history, judicial power rested with the executive branch. Thus, a mayor was not only the administrative head but also the chief judge.

²⁶² See generally Su Li, *Observation and Thoughts on Trial Committee of Local People's Courts*, 1 PEKING U. L. REV. 321, 364 (1999).

²⁶³ See generally Xiao Yang, President of the Supreme People's Court, Work Vigorously and Harder to Make the Improvement of the Local Courts Into a New Stage, Speech (June 23, 2000), in 66 ZUIGAO RENMIN FAYUAN GONGBAO 112, 113 [66 GAZETTE] (2000); He Wei Fang, *Several Comments on Judicial Committee*, 1 PEKING U. L. REV. 367, 367 (1999).

²⁶⁴ See *id.*

who have received a college degree, many of them have not graduated from law school. For the few who have received a law degree, a substantial number did so through continuing education. Ironically, the reality is that in many local people's courts there are no law school graduates, and most judges are military veterans.

It is true that the Law of Judges is expected to help improve the quality of judges in the people's courts.²⁶⁵ There is, however, doubt that the Law of Judges may achieve its goal of improving the quality of judges to a highly professional standard.²⁶⁶ The primary concern is that the professional requirements for a judge, as set forth in the Law of Judges, are too low because a law degree is not a minimum requirement.²⁶⁷ Also, even though formal college education is required, this requirement does not apply to those who became judges before the Law of Judges took effect on July 1, 1995.²⁶⁸

CONCLUSION

International civil litigation in the Chinese People's Courts has increased in the past decade, a trend likely to continue, especially after China becomes a member of the World Trade Organization. It is without question that China's huge market potential and fast growing economy are both attractive to foreign companies and investors. Nevertheless, the deficiencies in the Chinese judicial system are cause for caution. Although in recent years many efforts have been made in

²⁶⁵ See LAW OF JUDGES, *supra* note 255, art. 9. The 1995 Law of Judges (as amended 2001) provides certain requirements for a people's court judge. The requirements are: (1) Chinese citizenship; (2) twenty-three years of age; (3) upholding the Chinese Constitution; (4) having good political and professional quality and morale; (5) good health; and (6) qualifying educational requirements. In addition, on October 18, 2001, the Supreme People's Court adopted "The Basic Principles of Professional Ethics of Judges of the People's Republic of China" (Ethics Code). The Ethics Code consists of fifty articles aimed at standardizing and perfecting the professional ethical norms of judges, improving and enhancing the professional quality of judges, and maintaining the good image of judges in the general public. See ZHONG HUA REN MIN GONG HE GUO FA GUAN ZHI YE DAO DE JI BEN ZHUN ZE [THE BASIC PRINCIPLES OF PROFESSIONAL ETHICS OF JUDGES OF THE PEOPLE'S REPUBLIC OF CHINA] (2001), available at http://www.law-lib.com/law/law_view.html [hereinafter ETHICS CODE].

²⁶⁶ See generally CAO JIANMIN, RESEARCHES ON THE THEORY ISSUES OF CHINA'S JUDICIAL TRIAL METHODS 15-17 (2000).

²⁶⁷ See *id.* at 16.

²⁶⁸ Article 9 of the Law of Judges only provides that those who became judges before the effective day of the Law of Judges and did not meet the college education requirement shall arrange to receive training in order to meet an equivalent standard. See LAW OF JUDGES, *supra* note 255, art. 9.

China to improve judicial justice, progress is still quite behind general expectations.

Given China's strong desire to join the main stream of the world economy, it is certain that China will have to continue its on-going efforts to restore public confidence in the Chinese judiciary. Further improvement of judicial independence would result in the increased competence of the Chinese People's Courts to handle international civil litigation. However, it would seem unrealistic to anticipate China to fundamentally change its judicial system within a short period of time. Strategically speaking, it is important to ensure that China continues to make changes in the right direction. Further judicial reform will help attract international business in the years to come.